No. 203. 96

Supp. Br. of Stimson for Resp't.

Office Supreme Court U. S.
FILED
MAR 23 1899
JAMES H. McKENNEY, Clerk.

Filed Mar. 23, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898. No. 203.

THE WASHBURN & MOEN MANUFACTURING CO.,
Plaintiff,

v.

THE RELIANCE MARINE INSURANCE CO.,
Defendant.

SUPPLEMENTARY BRIEF OF THE DEFENDANT,

THE RELIANCE MARINE INSURANCE CO.

FREDERIC JESUP STIMSON,
of Counsel.

Supreme Court of the United States.

October Term, 1898. No. 203.

THE WASHBURN & MOEN MANUFACTURING CO.,
Plaintiff,

v.

THE RELIANCE MARINE INSURANCE CO.,
Defendant.

SUPPLEMENTARY BRIEF OF THE DEFENDANT,

THE RELIANCE MARINE INSURANCE CO.

FREDERIC JESUP STIMSON,
of Counsel.

NOTES ON THE ORIGIN, HISTORY AND REASON OF THE MEMORANDUM CLAUSE, AND OF THE AMERICAN OR MOIETY DOCTRINE OF CONSTRUCTIVE TOTAL LOSS.

Mr. Justice Story, in *Marcadier* v. *Chesapeake Ins. Co.*, 8 Cranch. 39, says expressly that the "exact *quantum* of damage which shall authorize an abandonment as for a total loss" had never then (1814) become the direct subject of adjudication in the English courts, and that the American rule, based on the celebrated treatise, *Guidon de la Mer*, was already then established, by which damage exceeding the moiety of the value of the thing insured is sufficient to authorize an abandonment, "but this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles."

The *Guidon de la Mer* (edition of Paris, by J. M. Pardessus, 1831), dating probably between 1556 and 1584, was adopted by Louis XIV., in 1681, and, says the editor, still forms the common law of Europe. Chapter V. is on averages (*Avaries*), and Article VIII. reads as follows: —

"*En grains, vin, sel, conserves, figues, raisins, oranges, melasses, harengc, olives, et autres provisions de vivres, parce qu'il advient quelquefois, avant estre deschargées, qu'elles sont empirées, ou, se gardant dans le navire, s'eschauffent, aigrissent, fondent, empuantissent, coulent, se gastent l'une l'autre, l'asseureur ne porte nulle telle sorte d'avaries; mais si, par tourmente, ce que dessus fust advenu, par jet fait en mer, pillerie ou depredation, l'asseureur payera l'avarie, si elle excede pour le regard des dits vivres cinq pour cent.*"

And Chapter VII., Article I., begins as follows: —

"*Il est en liberté du marchand chargeur faire delais* (*abandonment*) *à ses asseureurs, c'est-à-dire, quitter et delaisser ses droits, noms, raisons et actions de la proprieté qu'il a en la marchandise chargée, dont il est asseuré, quand il advient naufrage du tout ou de partie, ou bien avarie qui excede ou endommage la moitié de la marchandise.*"

It will be seen that the first paragraph above cited is the foundation of the memorandum clause, while the second is the foundation of the American doctrine of constructive total loss.

Martin, in his History of Lloyd's (London, 1876), tells us (page 46) that the policy in the Guidon de la Mer "corresponds exactly

with that adopted in England as early as the beginning of the seventeenth century," and then gives a copy of the policy in the Bodleian Library, dated 1613, which contains the use and labor, but not the memorandum clause. This latter was added to English policies in the year 1749, and runs as follows: —

"Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins are warranted free from average under five pounds per cent; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent unless general or the ship be stranded."

The English form of memorandum has never contained the words "perishable articles," although the articles were in fact perishable. Upon this point Manley Hopkins says: "The catalogue of exempted or partially exempted articles called the warranty or memorandum has been frequently varied or modified. As new productions have been added to commerce, and a greater experience has been obtained of those previously known, insurance companies have taken their own view of the risk attaching to merchandise, and whilst adopting the Lloyd's memorandum for their basis, have rearranged it to their own satisfaction. One company adds *saltpetre* in the list of goods free from average, another introduces *rice* in the number of those made free under five per cent, a third classes *jute* (a fibre only imported in late years) with hemp and flax. Indian offices excluded altogether from particular average metals and liquids, and, in general, raise the scale of exclusion from average. Different insurers take their own view; and, when they use the Lloyd's policy, make specific variations from the established memorandum in writing. Such arrangements between the insured and insurer in this part of the policy resolve themselves into questions of premium." (Manual of Marine Insurance, London, 1867, page 145.)

The earliest case discussing the memorandum clause is that of *Wilson* v. *Smith*, 3 Burrow, 1550 (1764), in which Lord Mansfield says: "The words 'free from average unless general can never mean to leave the insurers liable to any particular average."

The first text book discussing the clause is Millar's Law of Insurance (London, 1787) which says (page 357): —

"It is worthy of notice, that, in consequence of this clause, 'free of average,' it is necessary to adopt a different view of what consti-

tutes the distinction between a total and partial loss. It was formerly laid down, that a total loss is *whatever defeats the voyage.* This will not hold, however, where, in the *case* of perishable commodities, the underwriter has secured himself by the memorandum above stated. Here the subject must be actually gone. For what is the underwriter's view? To defend himself against the *perishable nature* of particular commodities, which renders them peculiarly liable to certain accidents. He means to be secure from all damage arising in consequence of that peculiar nature, whether such damage be great or small; whether it *defeats the voyage*, or only diminishes the price of the goods. The effect of the memorandum, therefore, is to prevent a loss from being considered as *total*, so long as the subject is in existence; *in order to abandonment*, it must be burnt, sunk, captured, or otherwise completely destroyed."

Joseph Marryat, M. P., in a pamphlet entitled "Observations upon the Report of the Committee on Marine Insurance" (London, 1810), defends the usage of Lloyd's in insisting on the memorandum clause, on the ground that before its adoption "the underwriters at Lloyd's submitted to pay most enormous averages on goods shipped to Hamburgh and Bremen. When goods arrived to a falling market, certificates were procured that they were all damaged more or less, and according to the courteous phraseology used on those occasions, they were immediately sold at public sale for the benefit of the underwriters, but in point of fact at a loss of forty or fifty per cent."

The present English rule which makes total extinction of value at an intermediate port, after setting off the actual value of the goods against the cost of reconditioning and reshipping, ground for abandonment, grew up *since* the adoption in the courts of New York and the United States, of the American rule exempting memorandum articles from constructive total loss; and could not now be adopted without doing away with the other American rule under which a loss of only a moiety is a constructive total loss of non-memorandum articles. The American doctrine was firmly established before English law assumed its modern shape, and the difference is fully recognized in the most recent English text books.

Thus Crump on Marine Insurance (London, 1875) says, "For the American law see *The Great Western Co.* v. *Fogarty* . . . and cases cited in the judgment," which case the editor cites from 30 Law Times Reports, n. s. 613, where the decision was reprinted in England.

And the most recent English text book (1887), while declaring

Cocking v. *Fraser* overruled in so far as it states that nothing short of "absolute destruction of the goods by the wreck of the ship" would suffice, goes on to say that "in the United States the rule in *Cocking* v. *Fraser* is supported to its fullest extent."

2 Arnould's Marine Insurance, page 1006.

The earliest case found in any American report appears to be that of *Gardiner* v. *Smith*, 1 John. Cases, 141, decided in the Supreme Court of New York in 1799, where Chief Justice Lansing merely refers to the American doctrine of constructive total loss as "the rule which has been established where a moiety is lost."

Kent, in the first edition, Vol. 3, p. 244 (1828), says, discussing *Cocking* v. *Fraser*:—

"Considering the difficulty of ascertaining how much of the loss arose by the perils of the sea and how much by the perishable nature of the commodity, and the impositions to which insurers would be liable in consequence of that difficulty, the rule of construction, as settled in that case, is very salutary, by reason of its simplicity and certainty." And then, after recognizing that its authority has been in some respects shaken in England, he says: "But in our American Courts, the doctrine of the case of *Cocking* v. *Fraser* is the received law."

So, in 1817, the Supreme Court of New York says (Yates, J.):—

"On this subject the courts of K. B. and C. P. in England are somewhat at variance. . . . We have adopted the doctrine of the King's Bench" (*Cocking* v. *Fraser*).

Saltus v. *Ocean Ins. Co.*, 14 John. 138, at p. 145.

Mr. Eugene P. Carver, of counsel for the plaintiff, petitioner, on the point that damage to cargo by reason of a protracted voyage is not a sea peril within the meaning of a policy of marine insurance, desires, in addition to his brief, to cite the case of

Perry *v.* Cobb, 88 Maine, 435, pages 440–447.

FREDERIC J. STIMSON,
of Counsel.